FILED
FEB 9 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966, No. 1045

JOSEPH B. SHEPPARD, SR., Administrator of the Estate of JOSEPH B. SHEPPARD, JR., and ANTHONY G. MOCCIA, Administrator of the Estates of WILLIAM BRADLEY BREON and MICHAEL J. MONDO, JR.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966, No.

JOSEPH B. SHEPPARD, SR., Administrator of the Estate of JOSEPH B. SHEPPARD, JR., and ANTHONY G. MOCCIA, Administrator of the Estates of WILLIAM BRADLEY BREON and MICHAEL J. MONDO, JR.,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on December 12, 1966.

CITATION TO OPINIONS BELOW.

The memorandum opinion of the District Court for the Eastern District of Pennsylvania is unreported and is printed in Appendix B hereto, *infra* at page 16. The Opinion of the Court of Appeals for the Third Circuit is reported at 369 F.2d 272, and is printed in Appendix B hereto, infra at pages 16-17.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on December 12, 1966. Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED.

Whether *Feres v. United States,* 340 U.S. 135 (1950) has been modified by subsequent decisions of this Court so that the next of kin and estates of three marines killed in the crash of an air force plane on which they were passengers may maintain an action against the United States under the Tort Claims Act based on the negligence of the air force pilot who flew the aircraft, members of the ground crew who serviced the aircraft and personnel in the control tower who gave erroneous take-off instructions to the pilot, there being no direct military relationship between decedents and the alleged tortfeasors, and there being no threat to military discipline by the maintenance of this action.

STATUTE INVOLVED.

The statute involved is the Federal Tort Claims Act (28 U. S. C. §§2671 et seq.), the relevant portions of which are printed in Appendix A hereto, infra at pages 14-15.

STATEMENT.

This action under the Federal Tort Claims Act (28 U.S.C. §§2671 et seq.) seeks damages for the estates and next of kin of three marines who, together with 69 other marines and an air force crew of 12, were killed in the crash of a United States Air Force plane in California on June 25, 1965, as a result of the alleged negligence of the Air Force and other government employees in the maintenance, operation and control of the aircraft. At the time of the accident decedents were passengers on the aircraft, being transported from one duty station to another.

The motion of the United States to dismiss the complaint under Rule 12 (b) for lack of jurisdiction over the subject matter and for failure to state a claim was granted by the District Court in reliance on *Feres v. United States,* 340 U.S. 135 (1950), since decedents were m mbers of the armed forces on active duty at the time of the accident.

The Court of Appeals for the Third Circuit affirmed the order of the District Court and likewise based its decision on the *Feres* case, ignoring the subsequent decisions of this Court which have severely modified and limited the reasoning of *Feres.*

REASONS FOR GRANTING THE WRIT.

1. The opinion of the Court of Appeals in the instant case, while in harmony with the literal language of *Feres v. United States,* 340 U.S. 135 (1950), is in conflict with the reasoning in *United States v. Brown,* 348 U.S. 110 (1954); *Indian Towing Co. v. United States,* 350 U.S. 61 (1955); *Rayonier v. United States,* 352 U.S. 315 (1957); and *Muniz v. United States,* 374 U.S. 150 (1963), which limited and altered the rationale of the *Feres* case. In a recent action based on the death of another marine killed in the same crash involved here the government's motion to dismiss was denied by the District Court for the Central District of California, which held that *Feres* had been modified and limited by later decisions of this Court, thus reaching a result in direct conflict with the present case. *Lee v. United States,* ——F. Supp. —— (C.D. Calif. 1966) (Reprinted in Appendix C hereto, at pages 18-25 infra). See also, Caruso, *An Analysis of the Evolution of the Supreme Court's Concept of the Federal Tort Claims Act,* 26 Fed. Bar J. 35 (1966).

Feres v. United States, 340 U.S. 135 (1950), held that a serviceman on active duty could not recover under the Tort Claims Act for injuries incident to their service even though the language and history of the Act was "persuasive of liability."[1] (340 U.S. at 138.) As later explained in *Muniz*

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[1] For example: The Tort Claims Act itself defines "employee of the government" for whose negligence the United Sates will be liable as including "members of the military or naval forces" (28 U.S.C. §2671.) Although many of the tort claims bills which preceded the final Act contained specific provisions excluding liability to servicemen in general, and although the Act itself contains twelve specific exclusions from liability, including an exclusion for "combatant activities of the military or naval forces, or the Coast Guard, during time of war" (28 U.S.C. §2680 (j)), there is no general exclusion of liability to servicemen in the Act. See **Brooks v. United States,** 337 U.S. 49, 51-52 (1949).

v. United States, 374 U.S. 150, 159 (1963), the five following reasons were articulated in *Feres* for denying recovery:

> "(1) the absence of an analogous or parallel liability, on the part of either an individual or a State; no individual has power to mobilize a militia, no State has been held liable to its militiamen; (2) the presence of a comprehensive compensation system for service personnel; (3) the dearth of private bills from the military; (4) the distinctly federal relationship of the soldier to his superiors and the Government, which should not be disturbed by state laws; and (5) the variations in state law to which soldiers would be subjected, involuntarily, since they have no choice in where they go."

United States v. Brown, 328 U.S. 110 (1954), allowed recovery to a veteran for injuries received in a veteran's hospital even though the plaintiff was entitled to the same veteran's benefits as he would be if his injury had been incurred on active duty,[2] thus eliminating the existence of veterans benefits as a ground for denying recovery. The Court explained *Feres* on the ground that recovery by military personnel on active duty would "visit the Government with novel and unprecedented liabilities." 348 U.S. at 112-13.

Indian Towing Co. v. United States, 350 U.S. 61 (1955), held the United States liable under the Tort Claims Act for the Coast Guard's negligence in failing to keep a lighthouse light burning causing plaintiff's tug to run aground, thus eliminating the absence of analogous private liability as a ground for denying recovery. The majority dealt with *Feres* by observing that *Feres* held only that "the Government is not liable under the Federal Tort Claims Act for

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[2] In **Brooks v. United States,** 337 U.S. 49, 53 (1949), the plaintiff was not barred from recovery even though he was likewise entitled to the same benefits as if he had been injured while not on furlough.

injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 350 U.S. at 69. The inadequacy of the majority's "distinction" of *Feres*, and the obvious conflict between *Indian Towing* and *Feres* was stressed in the dissenting opinion of Justice Reed, joined by Justices Burton, Clark and Minton, as follows:

> "In Feres we talked of private liability and came to a conclusion which is contrary to that reached by the Court today." (350 U.S. at 75.)

Rayonier v. United States, 352 U.S. 312 (1957), held the United States liable for the negligence of government employees in allowing a forest fire to start and in failing to extinguish the fire, thus further emphasizing that the absence of parallel private liability was not a basis for denying recovery. Although the majority opinion avoided mention of *Feres*, the language and spirit of *Rayonier* is in direct opposition to *Feres*. Whereas in *Feres*, 340 U.S. at 142, the Court had held:

> "We find no parallel liability before, and we think no new one had been created by this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities."

in *Rayonier*, 352 U.S. at 319, the Court held:

> "It may be that it is 'novel and unprecedented' to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability."

Moreover, the specific holding of liability for the negligence of public fire fighters in *Rayonier* is in direct opposition to *Dalehite v. United States*, 346 U. S. 15 (1953),

and in *Rayonier* (352 U.S. at 319) this Court held that the reasoning of the *Dalehite* case had been "necessarily rejected by *Indian Towing.*"[3] It necessarily follows that *Feres* had to fall with *Dalehite*. In *Dalehite* (346 U.S. at 43-4) the Court had held:

> "Our analysis of the question is determined by what was said in the Feres case. See 28 USC §§1346 and 2674. The Act, as was there stated, limited United States liability to 'the same manner and to the same extent as a private individual under like circumstances.' 28 USC §2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire. *This case, then, is much stronger than Feres.*" (Emphasis added.)

Recently in *Muniz v. United States*, 374 U.S. 150 (1963), where it was held that federal prisoners could sue under the Tort Claims Act for injuries sustained during their imprisonment, the Court dealt at length, with the various rationales articulated by *Feres*, holding that each of the rationales had been overruled by *Brown*, *Indian Towing*, or *Rayonier*.

The Court concluded its analysis of *Feres* by holding:

> "In the last analysis, Feres seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in

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[3] The lower courts have generally recognized that **Dalehite** is no longer valid since the **Indian Towing** and **Rayonier** cases. See **United States v. Hunsucker**, 314 F.2d 98, 104 (9th Cir. 1962); **Blaber v. United States**, 332 F.2d 629, 631 (2d Cir. 1964); **Fair v. United States**, 234 F.2d 288, 292 (5th Cir. 1956).

the course of military duty.' [Citing United States v. Brown]." 374 U.S. at 162.

Feres had made no mention of the possible effect on military discipline of recovery by a serviceman. When this Court, in *Muniz* (373 U.S. at 159), enumerated the five rationales articulated in *Feres* the effect on discipline was not among them. Thus, the line of cases culminating with *Muniz* marked a departure by this Court from the rationale on which the denial of recovery to servicemen is based, a departure which the Court of Appeals has totally ignored in the instant case.

2. The question of the extent to which *Feres* has been modified with regard to servicemen by *Brown, Indian Towing, Rayonier,* and *Muniz* has not been but should be settled by this Court. This Court has not decided a single case involving a serviceman as a plaintiff under the Tort Claims Act since *Feres,* and the absence of a specific explanation by this Court has obscured the rationale behind denying recovery to servicemen and has caused the lower courts to reach results inconsistent with that rationale.

For example, it has been uniformly held that servicemen may recover for injury or death to their dependents as a result of maltreatment in military hospitals,[4] while the dependents of a serviceman cannot recover for the serviceman's wrongful death in a military hospital resulting from the same type of negligence.[5] If an action for malpractice in a military hospital could interfere with discipline, it seems clear that the serviceman's recovery for the death of

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[4] **Rogers v. United States,** 216 F. Supp. 1 (S.D. Ohio 1963); **Legare v. United States,** 195 F. Supp. 557 (S.D. Fla. 1961); **Grigalauskas v. United States,** 103 F. Supp. 543 (D. Mass. 1951), aff'd 195 F.2d 494 (1st Cir. 1952); **Herring v. United States,** 98 F. Supp. 69 (D. Colo. 1951); **Messer v. United States,** 95 F. Supp. 512 (N.D. Fla. 1951); **Costley v. United States,** 181 F.2d 723 (5th Cir. 1950).

[5] **Van Sickel v. United States,** 285 F.2d 87 (9th Cir. 1960).

his dependent would pose more of a threat than the dependent's recovery for the death of a serviceman. This result appears even more incongruous when it is remembered that the wife's right of action for the death of her husband is an action belonging to her because of the damage she has suffered and not an action belonging to her serviceman husband, and in any event, in an action involving the death of a serviceman, there is not the remotest chance of interfering with his military discipline and, therefore, there is no justification for barring the claim.[6]

In another group of cases, liability has turned solely on the question of whether the accident occurred *on* or *off* the military reservation. Thus, where a military aircraft has crashed into the quarters of a serviceman recovery has been allowed where the quarters were nearby, but off, the base,[7] but, on the other hand, recovery has been denied where the aircraft crashed into quarters on the post.[8] This artificial line of distinction is not consonant with the rationale.

See *Gursley v. United States,* 232 F. Supp. 614, 615 (D. Colo. 1964) where the District Court complains of the "confusion" engendered by *Brooks* and *Feres.*

In *Callaway v. Garber,* 289 F.2d 171 (9th Cir. 1961), *cert. denied* 308 U.S. 874 (1961), the Ninth Circuit denied recovery to the estate of an air force sergeant in a case in-

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[6] Cf. **Johnson v. Peoples First National Bank & Trust Co.,** 394 Pa. 116, 120, 145 A.2d 716 (1958), where the Pennsylvania Supreme Court held that interspousal immunity from suit, the purpose of which is to preserve domestic felicity, is terminated by the death of one of the spouses since there is no longer any domestic felicity to preserve.

[7] **Snyder v. United States,** 118 F. Supp. 585 (D. Md. 1954), affirmed sub nom. **United States v. Guyer,** 218 F.2d 266 (4th Cir. 1954); **Sapp v. United States,** 153 F. Supp. 496 (W.D. La. 1957).

[8] **Orken v. United States,** 239 F.2d 850 (6th Cir. 1956); **Preferred Ins. Co. v. United States,** 222 F.2d 942 (9th Cir. 1955), cert. denied, 350 U.S. 837 (1955). Cf. **Downes v. United States,** 249 F. Supp. 626 (E.D.N.C. 1965); **Nowotny v. Turner,** 203 F. Supp. 802 (M.D.N.C. 1962); and **Brown v. United States,** 99 F. Supp. 685 (S.D.W. Va. 1951), where recovery was allowed for injuries received on a military post.

volving a collision on a public highway between a private automobile being operated by a navy recruiting officer in the line of duty and a private automobile in which plaintiff's decedent was travelling to a temporary duty station from his permanent post. After noting the basic principle underlying *Feres* as modified by *Brown* to be "the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty," the Court then observed:

> "The instant case can find no shelter within those reasons, since the negligent and injured parties were members of different branches of the service and were engaged in entirely different and unconnected activities at the time of the accident." (289 F.2d at 173-4.)

However, in the absence of a definite explanation by this Court, the Ninth Circuit felt compelled to follow the literal holding of *Feres*.

On the other hand, in *Downes v. United States*, 249 F. Supp. 626, 628 (E. D. N. C. 1965), the court held:

> "The real question then is a factual one: Was plaintiff performing duties of such a character as to undermine traditional concepts of military discipline if he were permitted to maintain a civil suit for injuries resulting therefrom?"

3. In the present case, the relationship of the decedents to the Government, insofar as is relevant to the happening of the accident, was not the "peculiar and special relationship of the soldier to his superiors," but rather the common relationship of airplane passengers to airplane operator. Their status as marines was merely a passive background or circumstance to the accident and was not the legal cause of the accident, "except in the sense that all human

events depend upon what has already transpired." See *Brooks v. United States*, 337 U.S. 49, 52 (1949). Although decedents were no doubt subject to military orders from the crew of the aircraft, such orders would be no different from the normal orders a commercial airline crew would give to its passengers such as "fasten seat belts" and "no smoking." And the ground crews and control tower personnel whose negligence in maintaining and controlling the aircraft is a partial basis for the present action would have had no contact with decedents at all. The instant case is *not* based on negligent orders given to the decedents by their military superiors. Moreover, the deaths of the decedents would eliminate any possibility of interference with military discipline.

It is inconceivable that knowledge by the decedents that they or their estates would have a right of action against the Government in the event of a plane crash would lead to breaches of discipline. And it is equally inconceivable that knowledge by the flight crew or ground crews that the military passengers on the plane could sue in the event that they negligently caused a crash would in any way interfere with the performance of their duties. If anything, the opposite is true. It is generally recognized that immunity from liability tends to breed neglect. *Georgetown College v. Hughes*, 130 F.2d 810, 824 (D.C. Cir. 1942); Prosser, *The Law of Torts* 23 (3d Ed. 1964). And in any event, the negligence of Air Force flight and ground crews can create liability in favor of civilians,[9] and can subject the negligent serviceman to criminal responsibility.[10]

The fact that decedents relationship to the Government was not peculiarly military is well illustrated by the fact

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[9] See e.g., **United Air Lines, Inc. v. Wiener**, 335 F.2d 379 (9th Cir. 1964); **Blumenthal v. United States**, 306 F.2d 16 (3d Cir. 1962); **Wildwood Mink Ranch v. United States**, 218 F. Supp. 67 (D. Minn. 1963); **Friedman v. Lockhead Aircraft Corp.**, 138 F. Supp. 530 (E.D.N.Y. 1956).

[10] For example, Article 93 (3) of the Uniform Code of Military Justice (10 U.S.C.A. §892) which makes dereliction of duty a crime. The

that the Military Air Transport Service, the branch of the Air Force involved here, frequently charters private airline planes and crews to transport service personnel. See 32 CODE FED. REGS. §§171.1-171.3 (1960). In cases where chartered Military Air Transport Service flights have crashed, death actions have been successfully brought against the airline operating the flight.[11] See *Indian Towing Co. v. United States*, 350 U.S. 61, 66-67 (1955), where this Court held:

> "Moreover, if the United States were to permit the operation of private lighthouses—not all inconceivable—the Government's basis of differentiation would be gone and the negligence charged in this case would be actionable. Yet there would be no charge in the character of the Government's activity in the places where it operated a lighthouse, and we would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance—the presence of identical private activity."

4. The present question is of obvious importance as is evidenced by the number of cases[12] in which injured

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Manual for Courts Martial at page 476 gives the following sample charge of a violation of Article 92 (3):

> "30. In that . . . at . . . ., on or about . . ., 19....., was derelict in the performance of his duties in that he negligently failed to inspect properly the engine on Aircraft No. . . . . thereby clearing it for flight with a loose spark plug."

[11] See for example: **Warren v. Flying Tiger Line, Inc.**, 352 F.2d 494 (9th Cir. 1965); **Mertens v. Flying Tiger Line, Inc.**, 341 F.2d 851 (2d Cir. 1965); **Schmidt v. American Flyers Airline Corp.**, 9 CCH Avi. 18,334 (S.D.N.Y. 1966).

[12] See e.g. **Calloway v. Garber**, 289 F.2d 171 (9th Cir. 1961, cert. den. 308 U.S. 874 (1961); **Van Sickel v. United States**, 285 F.2d 87 (9th Cir. 1960); **Lee v. United States**, —— F. Supp. —— (C.D. Calif. 1966) (Appendix C at 18 infra); **Downes v. United States**, 249 F. Supp. 626 (E.D.N.C. 1965); **Gursley v. United States**, 232 F. Supp. 614 (D. Colo. 1964).

servicemen or their estates seek recovery under the Tort Claims Act contending that this Court has by implication limited the broad application of *Feres*.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOSEPH G. FELDMAN,
Counsel for Petitioners.

HY MAYERSON,
Of Counsel.

APPENDIX A.

STATUTE INVOLVED.

THE FEDERAL TORT CLAIMS ACT.

28 U.S.C. §2671 DEFINITIONS

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term ——

* * *

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

28 U.S.C. §2674 LIABILITY OF UNITED STATES

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment of for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the

pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

28 U.S.C. §2680 EXCEPTIONS

The provisions of this chapter and section 1346(b) of this title shall not apply to ——

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

* * *

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country

* * *

APPENDIX B.

OPINIONS AND JUDGMENTS BELOW.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

ORDER.

AND NOW, this 27th day of July 1966, it appearing that the plaintiffs' claims for relief are governed by *Feres v. United States*, 840 U.S. 135 (1950), it is hereby Ordered that the defendant's motion to dismiss the complaint be and the same is Granted.

BY THE COURT:

J. M. DAVIS,
J.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Argued November 17, 1966

Before: McLAUGHLIN, KALODNER and HASTIE,
Circuit Judges.

OPINION OF THE COURT.

(Filed December 12, 1966.)

PER CURIAM.

Plaintiffs are the administrators of the estates of three United States marines who were killed in the crash of a United States Air Force aeroplane while they were on active duty, in the course of activity incident to that duty. The suit was under the Torts Claims Act, 28 U.S.C. 2671 et seq. It was dismissed by the District Court under Rule 12b, F.R. Civ. P. for lack of jurisdiction over the subject matter.

We hold that the ruling of the District Court was right and proper. Feres v. United States, 340 U.S. 135 (1950). The flat statement is made on behalf of appellants in their brief that "* * * subsequent decisions of the Supreme Court destroyed the validity of that case." Nothing could be further from the true fact. Appellants argue from decisions having no real bearing on the tight, clear problem presented. In the only other case since Feres involving the right of a service man to sue the United States in tort, United States v. Brown, 348 U.S. 110, 113 (1954), Mr. Justice Douglas for the Court states, "We adhere also to the line drawn in the Feres case between injuries that did and injuries that did not arise out of or in the course of military duty."

The judgment of the District Court will be affirmed.

APPENDIX C.

CONFLICTING OPINION.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA.

ARDELL LEE, et al.,
Plaintiffs,
vs.
UNITED STATES OF AMERICA,
Defendant.

Civil No. 66-1052-WPG.
Memorandum of Decision and Order.

Two enlisted men of the United States Marine Corps, on active duty, were in process of being transferred to Viet Nam, and for that purpose they were placed on board an airplane operated by the Military Air Transport Service, United States Air Force. In the course of taking off from the El Toro Marine Corps Air Station, California, to begin the overseas flight, the airplane crashed, and the two servicemen, along with many other people, were killed. Their personal representatives bring this action under the Federal Tort Claims Act, 28 U.S.C. sections 1346(b) and 2671 et seq. The complaint makes no charge against the Marine Corps or against MATS; it alleges, instead, that the crash was caused by the negligence of the Federal Aviation Agency in operating, maintaining and controlling the departure of the aircraft from the ground and in giving inadequate terrain clearance information.

The Government has moved to dismiss the action on the ground that, as a matter of law, the facts here concerned preclude recovery under the Tort Claims Act. The issue thus raised has been briefed by both sides, argued orally and submitted to the Court for decision.

The position of the Government is well summarized by the following sentence from Justice Jackson's opinion in *Feres v. United States,* 340 U.S. 135, 146 (1950):

> "We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."

If this is a correct statement of the law, the case at hand must be dismissed, because the deaths of the two servicemen clearly were in the course of activity incident to their service with the Marine Corps.

However, for reason hereinafter set forth, it is my conclusion that the above quoted sentence is no longer authoritative, that under present law these plaintiffs are not precluded from seeking relief under the Federal Tort Claims Act, and that the motion to dismiss must therefore be denied.

The terms of the statute, itself, give no indication that servicemen injured under the circumstances here concerned are to be deprived of the benefits of the Act. On the contrary, the fact that section 2680 specifically excludes "Any claim arising out of the combatant activities of the military or naval forces . . . during time of war" and "Any claim arising in a foreign country," would seem to indicate an intention to permit servicemen to assert claims arising in this country and not related to combatant activities. In this respect, the same conclusion was asserted by Justice Murphy, in speaking for the Court in *Brooks v. United States,* 337 U.S. 49 (1949). He pointed out that the Tort Claims Act, with the exceptions therein specified, provides for District Court jurisdiction over any claim for personal injury or death founded upon negligence, and he expressed

disbelief that " 'any claim' means 'any claim but that of servicemen' ". He also said that "It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain" (page 51).

In *Brooks*, two servicemen were riding in their automobile with their father along a public highway in North Carolina. They were doing so for their own purposes and presumably were on pass or furlough. One was injured and the other was killed when their car was struck by a United States Army truck. The Supreme Court held that the plaintiffs' action under the Tort Claims Act had been well founded.

In the course of his opinion in *Brooks*, Justice Murphy acknowledged that to adhere to the literal language of the statute and allow recovery to servicemen irrespective of how their injuries related to military service, might bring about outlandish results that Congress clearly would not have intended. "A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, . . ." occurred to the Court as examples in which the allowance of recovery would be incongruous. However, the opinion emphasized that the accident to the Brooks brothers had nothing to do with their military careers, and it asserted that the Court withheld comment as to a case involving an accident incident to such service.

Feres v. United States, 340 U.S. 135 (1950), was just such as case; actually there were three combined cases. In one, a soldier was quartered in barracks that should have been known to be unsafe because of a defective heating plant, and he died in the ensuing fire. The other two cases involved negligence by army surgeons in the course of medical operations upon servicemen. In each of the three instances recovery was sought under the Federal Tort Claims Act and the Supreme Court denied relief.

Justice Jackson wrote the opinion of the Court. He noted at the outset that the three cases had in common the fact

that ". . . each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces" (page 138).

It is to be noted that the first of these quoted circumstances distinguishes the *Feres* case from *Brooks*, and the second distinguishes *Feres* from the case at hand. However, throughout the balance of his opinion, Justice Jackson ignored the latter aspect of the factual proposition that he had expressed, and he considered the only question to be whether the Tort Claims Act extends its remedy to any serviceman who receives injury incident to his military service. He answered this question in the negative, and we now consider the reasons given for such conclusion and how they have survived subsequent examination by the Supreme Court.

1. The opinion in *Feres* reasoned that the primary purpose of the Tort Claims Act was to provide a remedy to those who had been without, as reflected in the large number of private bills that had stemmed from torts suffered at the hands of Government employees; that there had been no large number of private bills on behalf of military personnel, because they and their dependents had already been given a comprehensive system of relief; and that it therefore followed that Congress had not intended to benefit servicemen in the passage of the Tort Claims Act. Similarly, it was suggested that Congress presumably would not have intended to permit servicemen to have double recovery, and that therefore the failure of the Tort Claims Act to provide for adjustment between the relief therein granted and the military disability and death benefit system; indicated that the latter is to be the exclusive remedy.

This argument was specifically rejected four years later in *United States v. Brown*, 348 U.S. 110 (1954). There, a veteran had received a service connected injury to his knee, for which he was receiving compensation. The need for a

covery for damages resulting from the grounding of a tug due to the negligence of the Coast Guard in the operation of a lighthouse. Justice Reed dissented on the ground that further operation arose, and in the course of performing such operation the doctor in the Veterans Administration hospital negligently caused serious further and permanent damage to the patient's leg. The Supreme Court held that recovery under the Tort Claims Act should be allowed. The opinion referred to the decision in *Brooks* as having concluded ". . . that Congress had given no indication that it made the right to compensation the veteran's exclusive remedy, that the receipt of disability payments under the Veterans Act was not an election of remedies and did not preclude recovery under the Tort Claims Act but only reduced the amount of any judgment under the latter Act." The next sentence stated: "We adhere to that result" (page 113).

Likewise, in *United States v. Muniz,* 374 U.S. 150, 160 (1963), Chief Justice Warren, in speaking for the Court said that ". . . the presence of a compensation system, persuasive in *Feres,* does not of necessity preclude a suit for negligence" under the Tort Claims Act. Cf. *United States v. Demko,* 35 U.S. L. Week 4028 (U.S. Dec. 5, 1966).

2. Another argument that was persuasive in *Feres* was that the Tort Claims Act (in section 2674) provides that "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. . . ." The opinion reasoned that since private individuals do not maintain military establishments and therefore are not subjected to claims even remotely analogous to those at issue, the statute precluded recovery for the latter claims.

This argument was specifically rejected in *Indian Towing Co. v. United States,* 350 U.S. 61 (1955), which allowed re-

the majority decision had rejected the doctrine of the *Feres* case.

3. Justice Jackson, in *Feres,* also considered it significant that the Tort Claims Act ". . . makes '. . . the law of the place where the act or omission occurred' govern any consequent liability" (340 U.S. at 142). He then reasoned that it would not be rational to cause recovery by a serviceman to be governed by the laws of the place where the injuries occurred, inasmuch as he has no control over where his military duties might take him.

Inmates of federal penitentiaries, likewise, have a considerable lack of discretion with respect to the states in which they dwell. But this did not prevent the Court from holding that two such prisoners might recover under the Act for injuries that they sustained due to the negligence of supervisory personnel. *United States v. Muniz,* 374 U.S. 150 (1963). In the course of his opinion for the Court, Chief Justice Warren adverted to the *Feres* reasoning that is summarized in the preceding paragraph. He thereupon rejected it, concluding with the comment that although the nonuniform right to recover because of varying state laws might possibly prejudice some prisoners, ". . . it nonetheless seems clear that no recovery would prejudice them even more" (page 162).

Although the opinion in *Muniz* expressly stated that the Court found no occasion to question *Feres,* so far as military claims were concerned, it proceeded to discredit or express lack of enthusiasm for each of the reasons upon which the doctrine of that case was founded. Chief Justice Warren concluded his discussion of *Feres* as follows:

> "In the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed

for negligent orders given or negligent acts committed in the course of military duty. . . .' *United States v. Brown*, 348 U.S. 110, 112." (374 U.S. at 162.)

Thus, we have an explanation of *Feres* that provides the only authoritative and satisfactory basis for the decision that I have been able to find. It would follow therefrom that the exclusion of military personnel from recourse to the Act would not depend upon whether they were on active duty or on leave at the time of their injuries. Instead, it would depend upon whether or not the injuries stemmed from activities that involved an official military relationship between the negligent person and the claimant. If so, the claimant would be precluded; otherwise, he would not. That relationship did exist in *Feres*, and recovery was not allowed. The same was true in *Archer v. United States*, 217 F.2d 548 (9th Cir. 1954), cert. denied 348 U.S. 953 (1955), in *O'Brien v. United States*, 192 F.2d 948 (8th Cir. 1951), and in *Van Sickel v. United States*, 285 F.2d 87 (9th Cir. 1960). Such relationship was not present in *Brooks* or in *Brown*, in which the claimants prevailed. Thus, all of the decided cases are in harmony with this test, with the following exception.

Callaway v. Garber, 289 F.2d 171 (9th Cir. 1961), involved a situation in which three Air Force sergeants were under orders directing them to go from South Dakota to Seattle, Washington to attend a special service school. They properly chose to make the trip together by private automobile, and while doing so their car was struck by another automobile driven by a recruiting officer of the United States Navy while on official business. One of the three sergeants was killed, and his next of kin brought suit under the Tort Claims Act. The Court of Appeals affirmed the denial of recovery. The opinion by Judge Orr, set out the hereinabove quoted "explanation" of the *Feres* decision and very aptly observed that those reasons had no relevance to the case

at hand, since the official activities of the negligent party and those of the injured parties were entirely unrelated. The opinion then concluded by stating:

> "However, the instant case does fall within the rule of the *Feres* case as promulgated, and we must adhere to said rule since it was in no way negated or modified by the later *Brown* case" (page 174).

It seems to me that the negation of the *Feres* rule, for which Judge Orr somewhat wistfully was looking, has been provided by the later *Muniz* decision.

In the present case the two servicemen were killed in the course of their official relationships with the Marine Corps and with MATS. But the Federal Aviation Agency, whose alleged conduct is the only target of this action, is not a part of the military. It is an administrative agency created by Congress and given the responsibility of establishing and operating air navigation facilities and procedures for efficient air safety and traffic control. 49 U.S.C. section 1341 et seq. Such responsibility extends to all airports, civil as well as military. As far as the FAA was concerned, the decedents simply were two passengers in an airplane, just as in *Brooks* the two claimants were in the same position as any other motorist on the highway. Applying the test that I have derived from the hereinabove quoted "explanation" of the *Feres* decision, it follows that recovery by the present plaintiffs under the Tort Claims Act may not be foreclosed to them if they can prove the negligence that they allege.

The defendant's motion to dismiss the action is denied, and the defendant is given twenty days within which to answer the complaint.

Dated: December 15, 1966.

WILLIAM P. GRAY,
United States District Judge.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1045

JOSEPH B. SHEPPARD, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners are the administrators of the estates of three Marines who were killed while on active service in the crash of the Air Force airplane which was transporting them from El Toro Marine Corps Air Station, California, to Viet-Nam. Petitioners filed these suits under the Federal Tort Claims Act, alleging that the crash was caused by the negligence of members of the Air Force and other government employees. Relying on *Feres* v. *United States,* 340 U.S. 135, the district court dismissed the complaint (Pet. App. 16). The court of appeals affirmed, for the same reason, in a brief *per curiam* opinion (Pet. App. 17).

248-901—67

The decision below is clearly correct in applying the rule of the *Feres* case. This Court squarely held there (340 U.S. at 146):

> [T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.

Since it is undisputed that the deceased Marines were killed "in the course of activity incident to service"—while flying in a military aircraft pursuant to orders issued by their military superiors—the decision in *Feres* plainly required dismissal of the complaint. The holding in *Feres,* contrary to petitioners' suggestion, has not been modified. Indeed, it was explicitly reaffirmed in *United States* v. *Brown,* 348 U.S. 110, 113, where the Court declared:

> We adhere * * * to the line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty.

Nor does the decision below conflict with the decision of any other court of appeals. Other courts of appeals—like the court below—have been regularly applying the *Feres* ruling to service-incident deaths and injuries. See, *e.g., Preferred Insurance Co.* v. *United States,* 222 F. 2d 942 (C.A. 9) (where the court of appeals noted that the *Feres* rule, and subsequent congressional acquiescence in its holding, dispels any doubt as to the congressional purpose to exclude such claims from the Tort Claims Act), certiorari denied, 350 U.S. 837; *Archer* v. *United States,*

217 F. 2d 548 (C.A. 9), certiorari denied, 348 U.S. 953; *Buer* v. *United States,* 241 F. 2d 3 (C.A. 7), certiorari denied, 353 U.S. 974; *Norris* v. *United States,* 229 F. 2d 439 (C.A. 2); *Zoula* v. *United States,* 217 F. 2d 81 (C.A. 5). All of these cases reflect the settled principle that the compensation provided by the administrative system of military and veterans' benefits is the exclusive remedy for service-connected claims arising out of an activity incident to military service. Only three months ago, this Court noted that comparable administrative systems must be viewed as precluding tort actions and that a "series of comparatively recent cases in this Court has recognized this historic truth and ruled accordingly." *United States* v. *Demko,* 385 U.S. 149, 151.

Since the decision below correctly applies this Court's settled decisions and is not in conflict with the decisions of any other court of appeals,[1] the petition for a writ of certiorari should be denied.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.

MARCH 1967.

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[1] The decisions in *Indian Towing Co.* v. *United States,* 350 U.S. 61, *Rayonier* v. *United States,* 352 U.S. 315, and *United States* v. *Muniz,* 374 U.S. 150, relied on by petitioners (Pet. 4), are inapposite. Those were all suits by civilians. Petitioners can obtain little comfort from *Lee* v. *United States,* C.D. Calif., No. 66-1052-WPG, decided February 15, 1967 (Pet. App. 18). The district judge there stands alone in refusing to follow *Feres*; the government's application under 28 U.S.C. 1292(b) for leave to take an interlocutory appeal from that decision is pending before the Ninth Circuit.

U.S. GOVERNMENT PRINTING OFFICE: 1967

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966, No. 1045.

JOSEPH B. SHEPPARD, SR., et al.,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITIONERS' REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO THE PETITION FOR CERTIORARI.

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PETITIONERS' REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO THE PETITION FOR CERTIORARI.

Respondent cites several Court of Appeals decisions (Resp's Memo. 2-3) as support for the proposition that the *Feres* case has not been modified. However, all of the cases cited by respondent predate *Rayonier v. United States,* 352 U.S. 315 (1957), and *United States v. Muniz,* 374 U.S. 150 (1964), which are the cases petitioners contend substantially modified the prior holding in *Feres.* Moreover, respondent's assertion (Resp's Memo. 3, n. 1) that the *Indian Towing, Rayonier* and *Muniz cases* are inapposite because they involve claims by civilians ignores the analysis of the *Feres* case made in *Muniz,* 374 U.S. at 159-162, in which it was held that *Indian Towing* and *Rayonier* had rendered invalid the various rationales articulated in the *Feres* case.

Respondent suggests (Resp's Memo. at 2) that Congressional silence since *Feres* confirms the holding that Congress intended to exclude recovery by servicemen. However, in the *Muniz* case, 374 U.S. at 158, n. 14, this Court held with regard to prisoners' claims that the construction given an act by a subsequent Congress is not determinative of the intention of the Congress that passed the Act. See also *Helvering v. Hallock,* 309 U.S. 106, 121-2 (1940), which held that "to explain the cause of nonaction by Congress when Congress itself sheds no light is to venture into speculative unrealities."

Respondent's argument that the availability of military and veteran's benefits[1] precludes recovery by servicemen

[1] Veteran's death benefits as it existed at the time of the passage of the Tort Claims Act, 38 U.S.C. §472, 701 (c) (1954 ed.) and as it exists at the present time, 38 U.S.C. §§322 (6), (7), is for the benefit of the widow, children and dependent parents of the servicemen killed on active duty. The complaint in the instant case shows that none of the decedents involved here was survived by a widow, children or dependent parents.

under the Tort Claims Act, is contradicted by the holdings in *Brooks v. United States*, 337 U.S. 49 (1949) and *United States v. Brown*, 348 U.S. 110 (1954). In *Brooks* this court held that a serviceman injured while on leave could recover under the Tort Claims Act, even though he was entitled to the same administrative benefits as if he had been injured in the performance of his military duties,[2] since, unlike the usual workman's compensation law, there is nothing in the veterans laws to indicate Congress intended an exclusiveness of remedies (337 U.S. at 53).

In *Brown* this Court held that a veteran could collect under the Tort Claims Act for negligent treatment in a veteran's hospital of a knee injury he had received on active duty even though he was entitled to full administrative benefits the original injury having been incurred while on active duty.

In support of its argument that the availability of veteran's benefits precludes recovery by servicemen respondent cites *United States v. Demko*, 385 U.S. 149 (1966), in which this court recently held that federal prisoners who are entitled to compensation benefits are precluded from a remedy under the Tort Claims Act. The *Demko* opinion makes no mention of *Brooks*, *Brown* or any other case involving the veterans laws, but instead relies on *Johansen v. United States*, 343 U.S. 427 (1951), and *Patterson v. United States*, 359 U.S. 495 (1959).[3] *Johansen*, which held that a civilian employee of the government who was entitled to benefits under the Federal Employees Compensation Act could not

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[2] An injury incurred during military service is deemed to have been incurred in the line of duty for purposes of veteran's benefits regardless of whether the serviceman is injured while performing his military duties or while on authorized leave. 38 U.S.C. §105.

[3] **Demko** also cites several lower federal court decisions (385 U.S. at 151, n. 4) none of which involve the veterans law.

sue the United States under the Public Vessels Act, was distinguished in the *Brown* case as follows:

> "Congress could, of course, make the compensation system the exclusive remedy. The Court held in Johansen v. United States . . . that Congress had done so in the case of the Federal Employees Compensation Act, with the result that a civilian employee could not sue the United States under the Public Vessels Act. We noted in the Brooks Case, 337 U.S. 49, 53 . . . that the usual workmen's compensation statute was in this respect different from those governing veterans, that Congress had given no indication that it made the right to compensation the veteran's exclusive remedy, that the receipt of disability payments under the Veteran Act was not an election of remedies and did not preclude recovery under the Tort Claims Act but only reduced the amount of any judgment under the latter Act" (348 U.S. at 113).

The *Patterson* case, which also held that federal employees could not sue the United States under the Public Vessels Act, although decided after *Brown* made no mention of *Brown* or any other serviceman case, but relied entirely on *Patterson*. Thus, a clear dichotomy has evolved in this Court between cases holding that the workmen's compensation laws are a bar to recovery and cases holding that the veteran's laws are not a bar to recovery. Implicit in respondent's argument that *Demko* bars recovery in the instant case is the argument that *Demko* overruled *Brooks* and *Brown* by implication, further emphasizing the need for clarification by this Court.

WHEREFORE, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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